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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.**Supreme Court of Appeals.**

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

POWHATAN LIME CO. v. WHETZEL'S ADM'X.

Nov. 11, 1915. Rehearing Denied Nov. 26, 1915.

[86 S. E. 898.]

1. Master and Servant (§ 146*)—Rules—Customary Violation.—Although the master by express rule prohibits certain acts of his servants, that they constantly disregard the rules with his knowledge and acquiescence shows a waiver of the rule by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 284; Dec. Dig. § 146.* 9 Va.-W. Va. Enc. Dig. 685.]

2. Master and Servant (§ 278*)—Injury to Servant—Master's Rules—Waiver by Master—Evidence.—In an action for the death of a servant, evidence held sufficient to show that the master's rule not to ride dump cars across the trestle was habitually violated by the employees with the master's knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

3. Master and Servant (§ 288*)—Assumption of Risk—Questions for Jury.—Whether plaintiff's intestate assumed the risk in occasionally riding over a trestle, the dangers of which were not open, obvious, and continuous, held, on the evidence, a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

4. Master and Servant (§ 89*)—Personal Injuries—Scope of Employment.—Where deceased was employed in loading dump cars with rock, and, without being ordered to do so, rode on a car to the dump and assisted in dumping it, his acts were nevertheless within the scope of his employment, since, had he not done them, his work would have been retarded, and it was the custom of all servants in the same work to assist in dumping the cars at times.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.*]

5. Appeal and Error (§ 1070*)—Harmless Error—Verdict—Form.—The form of a verdict, finding for the plaintiff generally, not naming her in her capacity as administratrix of the deceased, and for a child by his full name, instead of a shorter form by which he was

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

called in the pleadings, was not prejudicial to the defendant, especially where no objection was made at the time of its rendition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

6. Trial (§ 343*)—Verdict—Construction.—A verdict must be liberally construed and upheld, unless so defective in form that its meaning is uncertain.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

7. Master and Servant (§ 291*)—Injury to Servant—Instructions.—Where there was evidence that the act of deceased, in riding the dump car over the trestle, by the fall of which he was killed, was within the scope of his employment, the court properly modified a requested instruction to find for defendant, if deceased left a safe place to work voluntarily, and rode the car over the trestle, by requiring a finding that his leaving was not within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.*]

8. Trial (§ 191*)—Instructions—Assuming Facts.—An instruction that, "Where an employee adopts the usual method of performing his work, which, with the knowledge and acquiescence of the employer, has been usually and generally adopted on other occasions, he can assume that the master has used ordinary care for his protection, and cannot be held negligent in so doing unless he knew, or by ordinary care should have known, the danger of so doing," does not assume that the acts were usual, or that the master acquiesced in them, but merely states correctly, a proposition, of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.* 7 Va.-W. Va. Enc. Dig. 701.]

9. Trial (§ 217*)—Instructions—Discretion of Court.—A requested instruction on the duty of the jury to try the case without sympathy, but according to law and facts, may be given or not within the discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 483, 485; Dec. Dig. § 217.*]

10. Trial (§ 260*)—Requested Instructions—Instructions Already Given.—It is not error to refuse a requested instruction on contributory negligence when that subject has already been fully covered in instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

11. Master and Servant (§ 274*)—Injury to Servant—Contributory Negligence—Evidence.—In an action for the death of a servant,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

killed by the collapse of a trestle while riding a dump car over it, in which the master contended that deceased could have walked behind the car on the trestle, evidence was properly admitted for plaintiff of prior accidents to employees while so walking, due to the cable which moved the cars, to rebut any deduction of contributory negligence in not walking as the safer way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

12. Appeal and Error (§ 971*)—Evidence (§ 546*)—Expert Opinion—Qualification of Expert—Discretion of Court.—Whether a practical house and barn builder is qualified as an expert to testify as to the construction of a simply built trestle is in the discretion of the trial court, the exercise of which will not be disturbed in the absence of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971; Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

13. Master and Servant (§ 270*)—Evidence—Other Accidents.—It is not error to admit evidence of other accidents at the place where a servant was killed, since such evidence tends to charge defendant, whose superintendent knew of them, with knowledge of the condition at that point.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

14. Evidence (§ 151*)—Death—Mental Suffering—Competency of Testimony.—It is not error to admit the testimony of a widow of a deceased servant in an action for his death, of her sorrow and mental suffering, since she was entitled to have the jury consider them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

15. Master and Servant (§ 270*)—Injury to Servant—Evidence.—Evidence that a foreman in one part of a quarry ordered his men not to ride cars is inadmissible in an action for the wrongful death of a servant killed in riding a car in a distinct department of the works where conditions were different.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

Error to Circuit Court, Shenandoah County.

Action by Whetzel's administratrix against the Powhatan Lime Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Robert H. Talley, of Richmond, and *Walton & Walton*, of Woodstock, for plaintiff in error.

Tavenner & Bauserman, of Woodstock, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.